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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS DAGOBERTO RIVAS,

Defendant and Appellant.

G048320

(Super. Ct. No. 12CF1124)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer. Affirmed in part, reversed in part, and remanded for resentencing.

Martin Kassman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Brendon W. Marshall and Christopher Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Carlos Dagoberto Rivas of three lewd acts on a child under age 14, one of which involved force (Pen. Code, § 288, subd. (a); counts 1 and 2; all statutory citations are to the Penal Code; § 288, subd. (b)(1); count 3), and found he was ineligible for probation (§ 1203.066, subd. (a)(1)). Rivas contends the trial court violated his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) by admitting his postarrest statements to police. He argues the prosecution failed to prove he knowingly and intelligently waived his rights. For the reasons expressed below, we reverse the sentence, remand for resentencing, and affirm the judgment in all other respects.

## I

### FACTS AND PROCEDURAL BACKGROUND

Maria O. testified Rivas began a romantic relationship with her mother and moved into the family's Santa Ana home when Maria was approximately six years old. On a morning when Maria was nine or 10, she was at home with Rivas watching television and wearing "a pajama, like a dress." She wore underwear but no bra. Rivas "dragged" her to the edge of the bed so that her legs were hanging off, and straddled her pressing his groin against her private area while moving up and down. Maria attempted to push him away. She did not "know if he raped [her], but [she] felt something around [her] private part" and felt a little pain "like around [her] stomach" as he moved back and forth. She cried during the abuse and screamed for help several times. Rivas finished and then left the room. Maria's underwear in the area of her vagina was wet. Maria did not tell anyone about the incident because she felt frightened and embarrassed.

Rivas touched Maria sexually on other occasions. She estimated these incidents began about two or three years after the initial incident, when she was 12 years old. He would do it “like once,” then stop for a few months, then start doing it again. Maria usually slept on the floor near the bed where her mother and Rivas slept. Rivas would crawl over to her on his hands and knees and then rub Maria’s breasts and thighs. Maria testified he did this “when we were asleep, when everybody was asleep. He will touch me over the clothing, my breasts and then my legs, my thighs.” Maria would tell him to stop and threaten to tell her mother or the police.

In June 2011, Maria moved in with her paternal aunt and uncle. She eventually disclosed the abuse to her aunt, who phoned the police in April 2012.

After speaking with Maria, Officer Daniel Carrillo and a partner interviewed Rivas at his residence on the evening of April 15, 2012. Rivas admitted during the recorded interview he “would touch her legs but I don’t remember about the breasts.” He also admitted he “did touch her [private] parts but I didn’t have sex with her.” After the interview, officers placed Rivas under arrest. Carrillo conducted a second recorded interview at the jail. Rivas recalled an incident where Maria wore pajamas resembling a dress. Rivas stated, “I believe she did show me her [parts]” and she took off her underwear after he got on top of her. At one point, Rivas conceded he “did pass by” her vagina with his erect penis, and later he conceded he touched the sides of her vagina with his penis. He knew “it was wrong because I didn’t tell her to do that, I don’t remember like I’m telling you but yeah nothing happen well.” Rivas repeatedly insisted he did not penetrate Maria or ejaculate.

Following trial in January 2013, the jury convicted Rivas as noted above. In April 2013, the trial court sentenced him to an 18-year prison term.

## II

### DISCUSSION

#### A. *Substantial Evidence Supports the Trial Court's Conclusion Rivas Understood His Rights*

Before trial, the prosecution moved to admit Rivas's statements to Carrillo when interviewed at his residence and later when in custody at the jail. The prosecution asserted Carrillo advised Rivas of his *Miranda* rights during the interview at Rivas's residence before asking him any questions about the facts of the case, Rivas knowingly, voluntarily, and intelligently waived his *Miranda* rights, and no *Miranda* re-advisement was necessary before or during Carrillo's second interview at the jail less than two hours later.

Rivas moved to exclude all his statements, arguing the officers violated his *Miranda* rights. He asserted Carrillo's *Miranda* advisement was poorly worded, he was not sufficiently made aware of the consequences of waiving his rights, and he did not understand the advisement.

At a pretrial hearing on the admissibility of Rivas's statements, Carrillo testified that on April 15, 2012, he and Officer Heitmann arrived at Rivas's residence around 10:40 p.m. Carrillo spoke to Rivas in Spanish when Rivas opened the door, explaining he wanted to speak with him about "an investigation [he] was performing." Carrillo was a "five percent" certified Spanish interpreter for the Santa Ana Police Department, which meant the police department paid him more money than other interpreters because of his fluency in Spanish.

Rivas invited the officers into the residence after Carrillo asked to speak with him about an investigation. Carrillo spoke to Rivas in Spanish throughout the

interview. He explained he was investigating a crime that occurred almost 10 years earlier and turned on an audio recorder he placed on the table. Carrillo advised Rivas of his *Miranda* rights by reading verbatim from his field officer's notebook. Carrillo did not have difficulty communicating with Rivas and he believed Rivas understood him, although he had to go over some of the rights more than one time. The interview lasted about 40 minutes.

The transcript of the initial interview reflects Rivas at the outset provided his name, date of birth, and physical characteristics. Carrillo advised Rivas he was investigating a case that was about nine years old and explained he was required to read Rivas his rights. Carrillo asked if he understood, and Rivas replied, "Well, I have never had these problems." Carrillo responded he was going to read Rivas his rights about "talking with me" and would tell Rivas "you do understand what . . . what I'm telling you and you will tell me 'yes' or 'no' and if you don't . . . understand me I will explain further, okay?" Rivas responded, "Okay."

Carrillo again informed Rivas the case under investigation was about 10 years old. When Carrillo asked Rivas if he understood, Rivas responded, "Uh-huh." Carrillo asked if this meant yes, and Rivas responded, "yes."

Carrillo then informed Rivas he had "the right to not say anything, you do understand?" Rivas either provided an incomplete sentence, or stammered.<sup>1</sup> Carrillo said "yes or no?" Rivas replied, "Uh-huh, yes, if \*\*\* I can't tell you anything." Carrillo stated, "Si, no, okay, you have – you have the . . . you have rights, okay. . . . I'm I'm going to explain you the rights you have. Okay, so, when I . . . I ask you, 'Hey you have

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<sup>1</sup> The legend accompanying the interview transcripts reflects "\*\*\*\*" denotes unintelligible conversation and "..." denotes pauses, incomplete sentences, and stammering but *not* missing words.

the right not to say anything.’ Okay, you have the right not to say anything, do you understand?” Rivas replied, “You will be telling me?” Carrillo said, “Yes.” Rivas said, “Okay.” Carrillo said, “Yes or no? You do understand?” Rivas either paused, provided an incomplete sentence, or stammered. Carrillo stated, “Yes. Yes or no? You have to say ‘yes’ or ‘no.’” Rivas responded, “Yes.” Carrillo then advised, “Okay. What you say today can be used on – against you in . . . in a court, do you understand?” Rivas replied, “No.” Carrillo responded, “Okay. You have . . . what you say today with us with . . . with me, uhm, can be used in . . . in . . . against a court, in . . . in the court, okay, so, each . . . each time you say something that can be used in court, okay. You do understand?” Rivas said, “Uh-huh.” Carrillo said, “Yes or no?” Rivas either paused, provided an incomplete sentence, or stammered. Carrillo said, “Okay. You have the right to an attorney before and during any questioning, if . . . if you desire it. Okay, so, if you want a . . . an attorney, you can call one, okay. Hhm, if you don’t have to . . . money to pay for an attorney, one will be appointed before any questioning if you desire it, you do understand?” Rivas either paused, provided an incomplete sentence, or stammered. Carrillo asked, “Yes?” and Rivas replied, “Yes.”

Carrillo admonished Rivas, “it’s going to be very important that you tell the truth of what happened.” When Carrillo asked if Rivas understood, Rivas responded, “Uh-huh. Yes.” Carrillo proceeded to question Rivas about the case. Rivas appeared to understand Carrillo and responded to his questions appropriately.

At the conclusion of the interview, Carrillo arrested Rivas, handcuffed him, placed him in the patrol car, and drove to the jail, which took a couple of minutes. They continued to talk in the car. Carrillo told Rivas “to be honest, be honest with himself.” Rivas stated he wanted to speak about what happened, but Carrillo told him to wait. At

the jail, Carrillo took Rivas into an interview room, closed the door, and turned on his recorder. Carrillo did not re-advise Rivas of his *Miranda* rights because they were given to him less than an hour earlier. At no time during the two interviews did Carrillo feel that Rivas did not understand or communicate with him, and Rivas responded appropriately to Carrillo's questions. Rivas made further admissions during the 25-minute jail interview.

Rivas testified he was 37 years old at the time of the interviews, the highest grade he completed in school was sixth grade in his native Guatemala, and he entered the United States when he was 12 or 13 years old. He could not read English. Rivas claimed he had difficulty understanding Carrillo's Spanish, declaring Carrillo "doesn't speak very much Spanish." Rivas did not remember Carrillo telling him he did not have to say anything and did not "really remember [Carrillo] reading [him his] rights." Nor did he recall other questions Carrillo asked, such as the color of Rivas's hair. Looking back, Rivas asserted he did not understand the officer's explanation of his rights.

The trial court concluded Rivas knowingly and intelligently waived his *Miranda* rights. The court disbelieved Rivas's claim he did not understand Carrillo's explanation of his Miranda rights, observing, "I just don't believe that the defendant did not understand what Officer Carrillo was saying at any point in time in these two interviews. I mean maybe there was a little bit of a language difference or an accent by one or the other, but it was all explained, and all of the responses do appear to be appropriate. . . . I believe he was properly advised of his rights [and] he understood those rights . . . ."

In a criminal trial, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant

unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” (*Miranda*, *supra*, 384 U.S. at p. 444.) The suspect must be warned before any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and if he cannot afford an attorney one will be appointed for him before any questioning if he so desires. (*Miranda*, at pp. 478-479; *People v. Polk* (2010)

190 Cal.App.4th 1183, 1192 [failure to give *Miranda* warnings precludes introduction of the defendant’s statements in the prosecution’s case-in-chief].) After warnings have been given, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. A suspect may expressly or impliedly waive these rights. A waiver of the right to remain silent and the right to counsel “may be implied through ‘the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver.’” (*Berghuis v. Thompson* (2010) 560 U.S. 370, 384 (*Berghuis*); see *People v. Cruz* (2008) 44 Cal.4th 636, 667 [“A suspect’s expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights”].) The prosecution bears the burden of proving a waiver by a preponderance of the evidence. (*Berghuis*, at pp. 380, 384, 388; *People v. Gomez* (2011) 192 Cal.App.4th 609, 627)

In reviewing the trial court’s ruling on a *Miranda* issue, we must accept the trial court’s determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*. (*People v. Davis* (2009) 46 Cal.4th 539, 586.) In making this determination, we “““give great weight to the considered conclusion” of a lower court that has

previously reviewed the same evidence.’ [Citations.]” (*People v. Wash* (1993) 6 Cal.4th 215, 236.)

Rivas contends the trial court erred in not finding a *Miranda* violation because the record shows Rivas did not understand he had the right to remain silent and that anything he said could be used against him at trial.

The Attorney General argues no *Miranda* warnings were required because Rivas was not in custody during the first interview. We must assume the contrary, however, because the prosecution below failed to dispute Rivas’s claim he was in custody during the initial interview. (See *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404 [custody determinations require trial courts to examine facts surrounding the interrogation before applying the controlling legal standard].) The prosecutions’s failure to raise the issue deprived Rivas of the opportunity to introduce facts showing he was in custody when interrogated at his residence, and therefore it would be unfair to make that determination on this record, as the Attorney General now urges us to do. Whether the suspect was subjected to custodial interrogation is a fact-intensive inquiry and depends on the surrounding circumstances. The Attorney General may not rely on Rivas’s noncustodial status because the prosecution forfeited the issue by not raising it in the trial court. (See *People v. Polk, supra*, 190 Cal.App.4th at pp. 1191-1195 [defendant forfeited claim of inadequate *Miranda* warnings by failure to raise issue in the trial court].)

We therefore turn to Rivas’s claims that Carrillo violated his *Miranda* rights in the initial interview at his residence. Rivas argues the prosecution failed to demonstrate he understood his right to remain silent and that his statements could be used against him in court. (*Miranda, supra*, 384 U.S. at pp. 444, 467 [person must “be informed in clear and unequivocal terms that he has the right to remain silent”]; *People v.*

*Samayoa* (1997) 15 Cal.4th 795, 830 (*Samayoa*) [police officers are not required to employ the exact words used in the *Miranda* decision but must provide warnings that reasonably convey to a suspect his or her rights]; *Berghuis, supra*, 560 U.S. at p. 384 [*Miranda* warning and an uncoerced statement does not establish a valid waiver; prosecution also must show the accused understood his rights].)

As noted, Carrillo advised Rivas, “Okay, so, you have the right not to say anything, you do understand?” When Rivas initially did not answer the question, Carrillo followed up by asking, “Yes or no?” Rivas replied, “Uh-huh, yes, if \*\*\* I can’t say anything?” Carrillo then told Rivas again he was going to explain his rights, and asked, “Okay, you have the right not to say anything, do you understand?” Rivas replied, “You will be telling me?” Carrillo said “Yes” and asked Rivas whether he understood. After a couple of inquiries on whether he understood, Rivas responded “Yes.”

Rivas argues the above exchange reflects he understood Carrillo *would* be telling him his rights, not that he already had informed him of his right to remain silent. We disagree. Although labored and awkward, this exchange nevertheless reflects Carrillo advised Rivas he did not have to say anything, which was the equivalent of advising him he had the right to remain silent. Rivas ultimately stated he understood when he answered “yes” to Carrillo’s inquiry.

Rivas also contends Carrillo never informed Rivas his statements during the interview could be used *against him* in court, instead explaining that “each time you say something that can be used in court, okay.” Before this exchange, however, Carrillo informed Rivas his statements “can be used in . . . in . . . against you in . . . in court, do you understand?” When Rivas replied he did not understand, Carrillo engaged in the exchange that Rivas faults as inadequate. But *Miranda* warnings need not be presented

in any “precise formulation” or “talismanic incantation.” (*California v. Prysock* (1981) 453 U.S. 355, 359.) As our Supreme Court observed, “a reviewing court need not examine a *Miranda* warning for accuracy as if construing a legal document, but rather simply must determine whether the warnings reasonably would convey to a suspect his or her rights required by *Miranda*.” (*Samayoa, supra*, 15 Cal.4th at p. 830.) We conclude Carrillo’s explanation adequately explained the consequences if Rivas agreed to answer the officer’s questions.

To support his argument, Rivas points to his response to Carrillo’s question asking Rivas if he understood he had the right not to say anything. Rivas argues his reply, “Uh-huh, yes, if . . . I can’t say anything” shows he did not understand his right to remain silent. But Carrillo responded by explaining Rivas had “the right not to say anything” and that he was telling Rivas his rights, and Rivas acknowledged he understood. Rivas proceeded to answer the officer’s questions and had no difficulty understanding Carrillo. Rivas contends the record shows he informed Carrillo he did not understand Carrillo’s explanation that anything Rivas said could be used in court. When Carrillo asked if Rivas understood this, Rivas responded, “Uh-huh,” which Rivas argues meant “no.” Viewed in isolation, however, Rivas’s response is ambiguous. The trial court resolved this factual dispute by finding Rivas’s response constituted an acknowledgement he understood Carrillo’s explanation.

Substantial evidence supports the trial court’s determination. The transcript shows Rivas employed the expression, “Uh-huh,” as an affirmative response during the interview. For example, when Carrillo asked Rivas if he understood the case under investigation was about 10 years old, Rivas responded, “Uh-huh.” Carrillo asked if that meant “yes,” and Rivas responded, “yes.” When Carrillo asked Rivas if he understood he

had the right not to say anything, Rivas responded, “Uh-huh, yes . . . .” At another point in the interview, Carrillo informed Rivas it was important to tell the truth, warned Rivas that Carrillo had spoken with the victim and Rivas’s wife, and asked if he understood. Rivas replied, “Uh-huh, yes.” Later, Carrillo accused Rivas of touching the victim’s chest and asked Rivas if he understood this reference. Rivas responded, “Uh-huh, yes.” The trial court reasonably could conclude Rivas used the expression “Uh-huh” as an affirmative response based on his affirmative use of that term in other parts of the interview.

The trial court’s rejection of Rivas’s testimony claiming he did not understand his rights further supports the court’s factual determination. At oral argument Rivas argued the court’s finding it disbelieved his account of the interview did not relieve the prosecution of its burden to prove Rivas understood his rights, which it failed to do because the transcript shows he did not understand his rights. We disagree for two reasons.

First, the burden of proof applies in the trial court, not on appeal. As our Supreme Court explained, the burden of proof “‘is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.’” (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750.) Second, the transcript does not show Rivas ultimately did not understand his rights. The transcript of the interview required the trial court to resolve whether Rivas’s use of the term “Uh-huh” was an affirmative response. In doing so, the court could weigh in the balance Rivas’s lack of credibility in denying he understood Carrillo’s explanation of his rights, and that Carrillo did not speak “very much” Spanish. Had Rivas not testified the court may have faced a closer issue, but Rivas did testify, and the court therefore could

take account of his testimony in resolving Rivas's claim. Because substantial evidence supports the court's determination, Rivas's challenge to the admission of his statements fails.

*B. The Trial Court's Imposition of a Consecutive Full Term on Count 3 Was Not Authorized by Statute*

As noted, the jury found Rivas guilty of three lewd acts, one of which was forcible. The first nonforcible lewd act (§ 288, subd. (a)) occurred between March 30, 2004 and March 29, 2006 (count 1), and the second occurred between March 30, 2006 and March 29, 2007 (count 2). The forcible lewd act (§ 288, subd. (b)(1)) occurred between March 30, 2002 and March 30, 2005 (count 3). At the time Rivas committed the lewd acts, the punishment for each violation was three, six, or eight years in prison.

The trial court imposed an 18-year prison sentence, comprised of the upper term of eight years for the nonforcible lewd act charged in count 1, a consecutive two-year term (one-third of the midterm) for the nonforcible lewd act charged in count 2, and a full consecutive upper term of eight years for the forcible lewd act charged in count 3. The court stated: "Accordingly, at this time, the court does select the upper term of confinement of eight years in the state prison as to count 1. The acts were separate. They were distinct. They occurred over a long period of time. Each time the defendant touched this child, he had an opportunity to reflect on what he was doing and what he was doing to her, and still he chose to continue his abuse year after year after year. And, consequently, I think that there was clarity for the jury that this count was a separate act of a similar variety as the count in-as the charge in count 1. Consequently, the court will sentence defendant to one-third the middle term, two years [on count two], consecutive to the sentence heretofore imposed in count 1. I believe that we're using the sentencing

triad that was in effect at the time the crime was committed as to count 3. The court selects the upper term of eight years for the reasons heretofore stated and the fact that the defendant had an opportunity to stop before he got this far and apparently chose not to.” The court also remarked Rivas “has not accepted any responsibility. He has not expressed any remorse for his role in what our victim has suffered for such a long period of time. And that was a consideration for me in selecting the upper term.”

Section 667.6, subdivision (d), provides: “A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions. . . . [¶] . . . The term shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.”

A trial court must impose a consecutive sentence for forcible lewd acts as specified in section 667.6, subdivision (e)(5). The Attorney General agrees with Rivas that he was not subject to the *mandatory* full consecutive term requirement of subdivision (d) because he was not convicted of more than one specified offense. (*People v. Jones* (1988) 46 Cal.3d 585, 594-595 & fn. 5; *People v. Goodliffe* (2009) 177 Cal.App.4th 723, 727, fn. 10 (*Goodliffe*) [mandatory sentencing scheme applied only when a defendant stands convicted of more than one offense specified in subdivision (e)].)

Although a consecutive sentence on the forcible lewd act was not mandatory, the Attorney General argues the trial court exercised its informed discretion to impose a consecutive term. Rivas views the record differently, arguing the trial court

erroneously believed a full consecutive term was mandatory. He cites the parties' sentencing briefs, which the Attorney General agrees reflect *the parties* mistakenly assumed the court had to impose a full consecutive term for the count 3 forcible lewd acts offense. Rivas also relies on the trial court's statement at sentencing that Rivas had received an offer before trial of three years if he pleaded guilty, the court had advised him if he went to trial he faced a minimum term of eight years and a maximum term of 18 years, and the offer was lower than the minimum sentence for three violations. Rivas emphasizes the trial court could calculate an eight-year minimum sentence only if it believed it had to impose consecutive sentences on all three counts, including two full terms (i.e., at least the mitigated term of three years, not a one-third midterm of two years;  $3 + 2 + 3 = 8$ ). The court also recalled that during the pretrial discussion everyone agreed "the defendant is facing two full consecutive terms, and one consecutive term at one-third the midterm for these three violations if he is convicted." Rivas notes "[t]he only authority mentioned by anyone in connection with the imposition of a full consecutive term on count 3 was Penal Code section 667.6, subdivision (d), which the prosecution cited in its sentencing brief."

Rivas also argues the trial court did not have *discretion* to impose a full, consecutive term under section 667.6, subdivision (c), which provides in relevant part: "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) *if the crimes involve the same victim on the same occasion*. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e)." (Italics added.) Rivas asserts the crimes here do not involve the same

victim on the same occasion, rather the prosecution alleged mutually exclusive time periods.

Based on our review of the record, it appears the trial court erroneously believed section 667.6, subdivision (d), applied and therefore required the court to impose a mandatory full consecutive sentence on count 3. The records show, and the Attorney General concedes, the parties informed the court Rivas was subject to a consecutive sentence under section 667.6, subdivision (d). Indeed, the court announced before trial and at the sentencing hearing Rivas's minimum sentence was 8 years. The minimum, however, was three years. The court could arrive at the eight-year calculation only if it assumed a mandatory sentence of at least three years consecutively imposed on two of the counts and two years (one-third midterm) consecutive to the remaining count. We need not resolve whether the trial court erroneously believed a full term consecutive sentence under the former version of section 667.6, subdivision (c), was unauthorized.

The prosecution alleged Rivas committed the lewd act charged in count 3 between 2002 and 2005. The version of section 667.6, subdivision (c), existing during this period gave trial courts the discretion to impose ““a full, separate, and consecutive term . . . for each violation of [an enumerated sex offense] *whether or not the crimes were committed during a single transaction.*”” (*Goodliffe, supra*, 177 Cal.App.4th at pp. 726-728.) The current version of section 667.6, subdivision (c), allows the trial court discretion to impose a full term consecutive sentence only if “the crimes involve the same victim on the same occasion.” (§ 667.6, subd. (c).) The Attorney General concedes the crimes here did not occur on the same occasion, but argues the trial court was required to apply the version of subdivision (c) in effect at the time the offense was committed

because an enacted statute does not apply retroactively unless the Legislature expressly states otherwise.

Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), the section 3 presumption against legislative retroactivity does not apply when the Legislature's amendment reducing the statutory punishment occurs between the time a defendant commits a crime and before the judgment of conviction becomes final. When this occurs, "the punishment provided by the amendatory act should be imposed." (*Id.* at p. 742.) This is what occurred here. Rivas therefore is entitled under *Estrada* to the benefit of the 2006 amendment to section 667.6, subdivision (c), which the Attorney General concedes eliminated a trial court's former discretion to impose a full consecutive term for an enumerated crime where the defendant also committed one or more nonenumerated crimes against the same victim on different occasions. Imposition of a full term on count 3, consecutive to a full term on count 1, was unauthorized.

### III

#### DISPOSITION

The sentence is reversed and the cause is remanded for resentencing. In all other respects, the judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.